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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 404.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* ANNIE COHN,

Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Appellees.

MOTION OF EDGAR M. LEVENTRITT FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

EDGAR M. LEVENTRITT,
Trustee for J. M. Joseph Trust,
Amicus Curiae.

EDGAR M. LEVENTRITT,
WM. R. GREEN, JR.,
J. MARK JACOBSON,
FRANK ALLAND,
of Counsel.

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Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT.

May It Please The Court:

The undersigned, trustee under the Deed of J. M. Joseph, having secured the consent of counsel for the appellant and the Attorney General of the State of New York, respectfully moves this honorable Court for leave to file the accompanying brief in this case as *amicus curiae* in support of the appellant's position.

The special reasons for this motion are as follows:

The undersigned is trustee of the J. M. Joseph Trust, which owns real estate in the City of Birmingham, State of Alabama, the net rents and income of which are distributable to an adult beneficiary, a resident of the State of New York, of which State the trustee is also a resident. As rents from real estate in Alabama are subject to income tax there, such rents would be subject to double taxation if the law here under review be upheld.

EDGAR M. LEVENTRITT,
Trustee of J. M. Joseph Trust,
as *Amicus Curiae*.

EDGAR M. LEVENTRITT,
WM. R. GREEN, JR.,
J. MARK JACOBSON,
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Appellees.

BRIEF OF *AMICUS CURIAE.*

I.

Object of Brief.

The purpose of this brief is to support as *amicus curiae* the appeal of the appellant herein from the final order of the New York Court of Appeals, entered upon its decision reported in 271 N. Y. 353, sustaining the constitutionality, under the Fourteenth Amendment of the Constitution of the United States, of Section 359 of the New York Tax Law (Cons. Laws, Ch. 60, as amended by Laws of 1935, Ch. 933, Sec. 1), in so far as it imposes an income tax upon rents from real property in a foreign State received by a resident of New York.

Income of the J. M. Joseph Trust is derived from rents of Alabama real property and accordingly this brief does not discuss the second issue, raised by the appellant herein, of the constitutional right of New York to tax income derived from foreign mortgages.

II.

Argument.

Summary of Argument.

The trend of recent tax decisions of this Court emphasizes the jurisdictional dangers of multiple taxation. To avert these evils, it has limited the taxing power of domiciliary states and has based tax jurisdiction upon the principle of the situs of property. This trend should be continued and applied to domiciliary income taxation of rents from realty located in another state.

Within the rule that a State may not tax lands situated beyond its borders, no logical differentiation exists between a tax on land and a tax on the rents therefrom. In analogous situations, this Court has held that a tax upon the income from exempt property amounts to a tax upon the principal itself.

The decisions of this Court do not preclude a holding that New York is powerless to tax the income of a New York resident derived from rents of land situated in another state. Any analogy to the power of the Federal Government to tax income from property owned by American citizens abroad is utterly fallacious. And the decisions of this Court sustaining domiciliary taxation of income of residents derived from securities without taxable situs elsewhere or from personal activities elsewhere are not determinative of the right of the domiciliary state to tax the income of residents derived from rents from realty in another state.

POINT A.

The trend of recent tax decisions of this Court emphasizes the jurisdictional dangers of double taxation; limits the taxing powers of domiciliary States; and grounds tax jurisdiction upon the principle of the situs of property. This trend should be applied to domiciliary income taxation of rents from realty in another State.

The recent decisions of this Court disclose a definite tendency to draw away from theoretical conceptions respecting situs of property for taxation purposes which have the

anomalous and unjust results of localizing property in more than one place at one time. In *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 212, and *First National Bank* v. *Maine,* 284 U. S. 312, 325, this Court enunciated the sound proposition that "taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, as far as possible, unjust and oppressive consequences." We submit that this same practical point of view should be applied in the testing of State income tax laws.

During the past few years this Court has clearly and repeatedly construed the due process clause of the Fourteenth Amendment to avoid the patent evils of double taxation. In *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 93, it held that the domiciliary State of the *cestui que trust* of an estate consisting of intangible property with situs in another State had no power to tax the *cestui* upon his interest therein. The adoption of a contrary rule, it was declared, would "involve possibilities of an extremely serious character by permitting double taxation, both unjust and oppressive."

In *Farmers Loan & Trust Co.* v. *Minnesota, supra,* in denying to Minnesota the right to levy an inheritance tax on Minnesota public securities owned by a New York decedent and held by him at his domicile, the Court grounded its holding upon its legal aversion to double taxation. It is not permissible under the Fourteenth Amendment, the Court emphasized, for two States to have power to tax the same personalty on different and inconsistent principles.

> "And, we think, the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction [*mobilia sequuntur personam*]. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment."
>
> *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 211-212.

So determined was this Tribunal to destroy the evils of multiple taxation and to settle the jurisdictional limits of the States' taxing powers that in the above case it went to the length of specifically reversing *Blackstone* v. *Miller*, 188 U. S. 189, which previously lent support to the doctrine that choses in action were subject to taxation at both the debtor's and the creditor's domicile, and that two States might tax, on different and inconsistent principles, the same testamentary transfer of such property. That view, the Court held (p. 209), inevitably disturbed "good relations among the States" and produced "the kind of discontent expected to subside after the establishment of the Union." This view was reiterated in *First National Bank* v. *Maine*, 284 U. S. 312, 324.

The Court further stated (p. 326):

> "*The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it.* In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may

> be, at the same moment, within the taxable jurisdiction of as many as four states. * * * A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." (Italics ours.)

This opposition to multiple taxation and this construction of the Fourteenth Amendment to avoid the legal possibility of such taxation were reiterated in *City Bank Farmers' Trust Co.* v. *Schnader*, 293 U. S. 112.

The considerations that influenced the Court in those cases to enunciate a rule preventing multiple inheritance taxes on a single succession to property, despite the fact that such taxes operate but once, all the more justify a rule preventing multiple income taxation, which levies an annually recurring charge. Receipt of annual income from any specific parcel of realty is an event single in character. If it is unreasonable and incompatible with a sound construction of the due process clause of the Fourteenth Amendment to hold that the jurisdiction to tax a decedent transfer may be distributed among a number of States, logical consistency requires that the single act of receiving annual income from realty should not be subjected to conflicting State taxing jurisdictions.

To avoid the dangers of multiple taxation, this Court has limited the taxing jurisdiction of domiciliary States. It is well established that, neither for *ad valorem* property nor decedent estates taxes, does the domiciliary State have jurisdiction to tax a resident on the land or any interest in land situated in another State.

> *Senior* v. *Braden*, 295 U. S. 422.

Similarly, the domiciliary State may not tax a resident on tangible personalty which has acquired an actual situs elsewhere.

> *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193.
> *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18.
> *Frick* v. *Pennsylvania*, 268 U. S. 473.
> *City Bank Farmers' Trust Co.* v. *Schnader*, *supra*.

And where intangible property has acquired an actual situs elsewhere, the domiciliary State has no taxing jurisdiction. In *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, a Virginia resident transferred a fund of stocks and bonds to a Maryland trust company in trust for his children; the trustee was empowered to change the investments and to accumulate the income; the donor reserved a power of revocation but died without exercising it. This Court held that a tax by Virginia, the domiciliary State, upon the trust estate held by the Maryland trustee was invalid as a tax on property beyond the jurisdiction of Virginia.

In so delimiting the taxing power of the domiciliary State, this Court has clearly recognized that the doctrine of *mobilia sequuntur personam* is merely a legal fiction and, as such, must yield to the established fact of the actual presence and control elsewhere of property, tangible or intangible, and ought not to be applied where to do so would result in the injustice of double taxation.

> "The old rule expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs, the law of the place where the property is kept and used."
>
> *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22.

Wheeling Steel Corp. v. *Fox,* 298 U. S. 193.
Safe Deposit & Trust Co. v. *Virginia, supra.*
Frick v. *Pennsylvania,* 268 U. S. 473, 493.
State Board of Assessors v. *Comptoir National d'Escompte,* 191 U. S. 388, 404.
Buck v. *Beach,* 206 U. S. 392, 408.

To avert the evils of multiple taxation, this Court has furthermore clearly and repeatedly grounded State tax juris-

diction upon the principle of the situs of property. That State wherein property—realty, tangibles or intangibles—is integrated in the economic life of the community has the sole and exclusive jurisdiction to levy an *ad valorem* or inheritance tax directly upon or measured by that property.

In *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, this Court held invalid a Kentucky tax of a Kentucky corporation upon tangible personalty permanently located and employed elsewhere in the prosecution of its business. In reaching this decision, the Court held that the protection Kentucky afforded to the taxpayer domiciled there was not ground for taxing his property that had a situs beyond its borders. This proposition has been reiterated time and again.

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.
Railroad Co. v. *Jackson*, 7 Wall. 262.
State Tax on Foreign-Held Bonds, 15 Wall. 300.
Tappen v. *Merchants' National Bank*, 19 Wall. 490, 499.
Delaware, L., etc., R. R. Co. v. *Pennsylvania*, 198 U. S. 341, 358.

Similarly, if an individual keeps his intangibles—securities, accounts receivable, bank accounts—in a State other than his domicile and if they are integrated with its economic life there, then such State has exclusive tax jurisdiction.

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83.
State Tax on Foreign-Held Bonds, 15 Wall. 300.
New Orleans v. *Stempel*, 175 U. S. 309.
Bristol v. *Washington County*, 177 U. S. 133.
State Board of Assessors v. *Comptoir National d'Escompte*, 191 U. S. 388.
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395.
Liverpool & L. & G. Ins. Co. v. *Orleans Assessors*, 221 U. S. 346.

In inheritance tax cases, the Court has likewise declared that the right to transmit property at death is so intimate an element of the property right that a State cannot constitutionally burden it by a tax unless the physical property itself has a situs there.

Frick v. *Pennsylvania*, 268 U. S. 473.
City Bank Farmers' Trust Co. v. *Schnader*, 293 U. S. 112.

In *Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 213, the Court, citing its decisions on *ad valorem* property taxes, recognized the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. This proposition was reiterated in *First National Bank* v. *Maine*, 284 U. S. 312, 331. In both these cases, however, the record indicated that the intangibles therein were economically integrated at their owners' domicile; and consequently the Court was not there called upon to delimit the jurisdiction of the domiciliary State over death taxes on intangibles.

In the case of income taxes, too, this Court has rested jurisdiction upon the principle of situs. It argued, in effect, that the principles applicable to other types of taxation are applicable to income taxes. If the source of the income is closely related to the economic life of a State, then *that* State has jurisdiction to tax the income.

Thus, in *Shaffer* v. *Carter*, 252 U. S. 37, the Court sustained an income tax by Oklahoma upon the net income derived by a non-resident from oil wells owned and operated by him within that State. The language that this Court employed in the *Shaffer* case to sustain an income tax by the *non-domiciliary State*, we submit, is highly significant in determining that the *domiciliary State* cannot levy a second tax on the income derived from property that has an undisputed situs elsewhere. The Court said (p. 50):

> "In well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent

> gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these. * * * That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."

In the light of the *Shaffer* case, there can be no doubt but that New Jersey can constitutionally tax the identically same income from rents that New York is here attempting to tax. New York to-day collects an income tax upon the rents received by non-residents from New York realty (Sec. 351, N. Y. Tax Law).

If the economic and legal relationship between the domiciliary State and the property roots of a taxpayer's income cannot be established, then clearly the *sine qua non* of tax jurisdiction is absent and the tax is a deprivation of property without due process of law. To apply the language employed in the *Shaffer* case, where a State cannot tax the mine or the well, how can it tax the product; where it cannot tax the tree, how can it tax its fruit; where it cannot tax the land, how can it tax the crop?

When we examine income taxation realistically, it appears that jurisdiction to tax income does not differ materially from jurisdiction for purposes of other taxes. The State levies an *ad valorem* real property tax in return for the opportunities afforded by the possession of property; it levies an inheritance tax on land in return for the privilege of transmitting that property through death; and it levies an income tax on rents in return for the opportunities realized through the use of that property. The ultimate source of taxation—the land—is the same. In the case of the first two

taxes, this Court has clearly and repeatedly declared that, regardless of the nomenclature applied to the tax, only that State within which the property has its situs has the right to tax the land or any of its legal or economic incidents. Inasmuch as the sole source of the taxpayer's income from rents is his land, the same considerations and the same emphasis on situs, demonstrated in *ad valorem* and inheritance tax cases, should be adopted in respect to a tax upon the fruits of land. We submit that this Court should apply to domiciliary State income taxation of rents from foreign realty the same practical approach and jurisdictional arguments on which it has disallowed domiciliary State taxation of tangible and intangible property that has acquired a situs beyond its borders.

POINT B.

No logical differentiation, within the rule that a State may not tax lands situated beyond its borders, exists between a tax on land and a tax on the rents thereof.

Land and the rents therefrom are inherently so closely related to each other that whenever the question has arisen all courts, including New York and New Jersey, the jurisdictions here involved, have given to both the same legal incidents and attributes.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429.
United States v. *Noble*, 237 U. S. 74.
Green v. *Biddle*, 8 Wheat. 1.
Brown v. *Brown*, 33 N. J. Eq. 650.
Den ex dem. Farley v. *Craig*, 15 N. J. L. 190.
Van Wicklen v. *Paulson*, 14 Barb. (N. Y.) 654.
Marshall v. *Moseley*, 21 N. Y. 280.
State v. *Royal Mineral Ass'n.*, 132 Minn. 232.
Scully v. *People*, 104 Ill. 349.
Doe dem. Goldin v. *Lakeman*, 2 Barn. & Ad. 30.
Oahu Ry. & Land Co. v. *Pratt*, 14 Haw. 126.

This Court as early as 1823, in the case of *Green* v. *Biddle*, 8 Wheat. 1, 76, said:

> "A right to land essentially implies a right to the profits accruing from it, since without the latter, the former can be of no value. Thus a devise of the profits of land, or even a grant of them, will pass a right to the land itself. Shep. Touch. 93, Co. Litt. 4. b. 'For what,' says Lord Coke, in this page, 'is the land, but the profits thereof?' "

In the case of *United States* v. *Noble, supra,* this Court held that an assignment of the rents and royalties from real estate was an alienation of the land itself within the meaning of a congressional enactment forbidding Indians from alienating certain lands.

In the case of *Marshall* v. *Moseley*, 21 N. Y. at 286, the Court said:

> "It may be well to observe that rents are unlike annuities, and unlike the interest of money; they issue out of land, and are a part of the land; * * * "

In *Brown* v. *Brown*, 33 N. J. Eq. 650, it was held that the conveyance by a beneficiary under a will of his right to receive rents from lands was a conveyance of an interest in land within the Statute of Frauds.

These varied decisions are presented solely to demonstrate beyond cavil that common-law courts everywhere have recognized and applied the inherent relationship of rent and land.

This legal conclusion, to a large degree, is an outgrowth of the recognition by practical economists that land apart from its income can have no value, that real estate value and rents are inseparable. Leading authorities in the field of real estate appraisal state in the broadest terms that the only sound method of determining the value of land is the capitalization of its rent or income.

Richard T. Ely states:

> "The valuation of land implies the making of an estimate of the expected net income from the use of land over a period of years. In England the value of land is often expressed as 'twenty or twenty-five years purchase' of an annual income. In the United States the expected series of annual incomes is summarized in one figure which represents the present value of the succession of incomes and is called the capital value or selling value of the land. This process of capitalizing land income into capital value is considered the heart of the problem of land valuation."
>
> *Economic Essays in Honor of John Bates Clark* (1927), at p. 130.

For identical views see Frederick M. Babcock, *Valuation of Real Estate* (1932), p. 129; Philip W. Kniskern, *Real Estate Appraisal and Valuation* (1933), p. 241.

This Court, in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, in considering the nature of income taxes, has similarly recognized how intrinsically the same are land and its rents. The question there considered was whether a tax on rents was a direct tax within the meaning of the Federal Constitution requiring all direct taxes to be apportioned and the Court unequivocally held that it was a direct tax. The Court, in reaching this conclusion, stated, at page 580:

> "The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great

> classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. *An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.* This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in *Hylton's case,* 'land, independently of its produce, is of no value'; and certainly had no thought that direct taxes were confined to unproductive land." (Italics ours.)

Whether we consider the *Pollock* case as holding that a tax on rents is a tax on the land or not, the conclusion is irresistible that this Court there considered the land and the rents therefrom to be inseparable for tax purposes.

This interpretation of the *Pollock* case has been followed by the State courts in passing upon the right of a domiciliary State to levy taxes on income derived from foreign realty. The New Hampshire Court instructed the Legislature of that State that it could not under the Federal Constitution enact the same statutory provision involved in the instant case. In *Opinion of the Justices,* 84 N. H. 559, 573, it argued that due process of law requires the localization of income for State income tax purposes, and that, since a State cannot tax realty located beyond its borders and since a tax on rent is under the *Pollock* rule a tax on the realty from which derived, a State has no jurisdiction to impose an income tax on the rent from such realty when received by its residents. See also *Opinion of the Justices,* 220 Mass. 613, 624.

In *Matter of Pierson* v. *Lynch,* 237 App. Div. 763, aff'd without opinion 263 N. Y. 533, writ of certiorari dismissed as improvidently granted, 293 U. S. 52, a New York statute similar to the one here under consideration was declared unconstitutional on the basis of the *Pollock* case and the judicial construction of the due process clause of the Fourteenth Amendment. The few differences in fact between that case and the instant litigation are minute and insignificant. In the *Pierson* case title to the realty was in the

recipient of the income, whereas here the recipient of the income has only a life interest in the property. This slight difference obviously cannot be urged as a ground for the differentiation of the cases, since the question there involved the same broad issue of whether an income tax is such a tax as may be imposed by one State upon rents from real property located in another State. The fact that the New York statute has since the *Pierson* decision been amended to include specifically income derived from foreign rents is without significance, as that case was decided solely upon the ground that under the Fourteenth Amendment it was not within the power of New York to tax a New York resident on rentals or income received from land located beyond its borders.

This Court on the reargument of the *Pollock* case, 158 U. S. 601, 628, refused to refine away constitutional restrictions "by forced distinctions between that which gives value to property, and the property itself." We say here that the identical forced distinctions should not be used to refine away the salutary rule enunciated by this Court that one State cannot tax lands lying in another State. We believe the argument to be unanswerable that if New York can, under the guise of an income tax law, tax the rent from lands lying in New Jersey, then that rule has, as a practical matter, been evaded and abrogated.

The New York income tax return required to be filed by all taxpayers clearly and cogently demonstrates that the tax is, in effect, a tax on foreign lands. The taxpayer must list and swear to each parcel of realty he owns and his income from each separately. In computing his net income from rents, he is required to state for each parcel the gross rents collected and his deductions therefrom for repairs, depreciation, depletion, interest, taxes and other expenses (N. Y. Tax Law, Sec. 371, Regulations Art. 522). The very face of the return thus belies the argument that the income of the taxpayer derived from foreign rents is so commingled with his other income as to destroy all reference to its immediate roots in foreign lands.

This Court in the case of *Senior* v. *Braden*, 295 U. S. 422, has already expressed its disapproval of indirect taxation of

lands owned by a resident in a foreign jurisdiction. An Ohio statute taxing investments held by residents provided that in listing investments, "the amount of the income yield of each for the calendar year next preceding that date of listing shall * * * be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield." The tax amounted to 5% of the income yield. The taxpayer, a resident of Ohio, owned land certificates representing foreign real estate under which he was entitled to receive a fixed portion of the rents. This Court determined that the statute taxed an interest in foreign land, and was therefore unconstitutional. The certificates owned by the taxpayer were more than mere intangibles; they were rather "interests in land," and as such, under well-recognized principles, the State of Ohio had no jurisdiction to tax them. In reaching this conclusion, the Court said (p. 429):

> "The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature."

We submit that no essential difference exists between a tax on land reckoned upon its income and a tax on the income from the land as to warrant holding the first unconstitutional and the second a valid exercise of the taxing power. Since the primary purpose of owning land is to secure income therefrom, since a State cannot validly tax land beyond its borders, and since a high tax on incomes derived from foreign lands seriously impairs the value of the land, New York's attempt to tax the rents from New Jersey realty has the same practical effect as Ohio's attempt in *Senior* v. *Braden* to tax certificates of ownership in Illinois realty measured by the income thereof.

This Court has in a number of analogous situations affirmed our position that a tax on the income from property is in effect a tax upon the property-producing source of the income; and accordingly, where the property-producing source of the income—the land in the instant case—is clearly beyond the taxing jurisdiction of New York, that State cannot tax the income therefrom.

In the inheritance tax cases, as *Frick* v. *Pennsylvania*, *supra*, and *City Bank Farmers' Trust Co.* v. *Schnader*, *supra*, the States' attorneys argued that the tax was not upon the property transferred, but upon the right or privilege of transfer granted by the domiciliary State. This Court, however, looked through form to substance and held that, in essence, such a tax is one on the property transferred.

Moreover, in levying such an inheritance tax, the domiciliary State is not permitted to measure the so-called privilege tax by including property beyond its jurisdictional limits. In *Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 210, this Court expressed itself in the following clear and emphatic language:

> "In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment [citations]. Also, no State can tax the testamentary transfer of property wholly beyond her power [citations], or impose death duties reckoned upon the value of tangibles permanently located outside her limits [citations]."

See also:

R. I. Trust Co. v. *Doughton*, 270 U. S. 69.

In the instant case the Court should similarly disregard the purely legalistic argument that an income tax on incomes derived from rents is not upon property but upon the privilege of its receipt or use within the State, and should here too look through form to substance. The right to income from realty is as much an element of the property concept as is the right to its devolution or transfer. If, accordingly, a tax on its devolution constitutes a tax upon the property, then similarly a tax upon the fruits of the land is, in effect, a tax upon the land. And if New York may not tax the devolution of land beyond its borders, then likewise it cannot tax the fruits of the land situate in another State.

In a series of decisions concerning taxation of incomes derived from a governmental instrumentality, this Court has again enunciated the proposition that a tax on income derived from constitutionally exempt property is void. Of what value, this Court argued, is the constitutional exemption from taxation to the physical property if its income can be subjected to State taxation?

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, in addition to the issue already discussed—whether a tax on rent income constituted a tax on land—this Court was called upon to determine the validity of the Federal income tax levied upon the income derived from municipal bonds. After deciding that a municipal corporation is an instrumentality of the State government and that accordingly its property and revenues are beyond Federal taxing jurisdiction, the Court held that the relationship between such municipal securities and the income therefrom was so close that the preclusion of the former from Federal taxation covered the latter. The Court said:

> "It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities * * *."

In *Gillespie* v. *Oklahoma*, 257 U. S. 501, this Court, after finding that leases of restricted Indian lands constituted an instrumentality used by the United States in fulfilling its duties to the Indians, held that the State could not tax the net income derived by the lessee from the sale of his share of oil and gas under the lease. The Court said, at page 505:

> "'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long. In cases where the principal is absolutely

> immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void."

The doctrine of the *Gillespie* case has been consistently accepted and followed by this Court. In *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 275 U. S. 136, this Court held unconstitutional a State annual license fee on domestic insurance companies which consisted of 3% annually of the gross income of a corporation, where the income was in part interest from tax-free United States bonds. The Court said, at page 140:

> "Certainly, since Gillespie v. Oklahoma [citation] it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. * * * Accordingly, if the challenged acts, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is *pro tanto* void."

National Life Ins. Co. v. *United States*, 277 U. S. 508, 521, declared invalid a provision of a Federal act which treated tax-exempt securities in such a manner as to render their income taxable. The Court said:

> "It is settled doctrine that directly to tax the income from securities amounts to taxation of the securities themselves."

Likewise must it be true that directly to tax the income from land is in effect the taxation of the land itself.

In the instrumentalities cases it is significant to note that this Court was not influenced by the possibility of a taxpayer receiving his total income from exempt securities and thus not paying for the so-called "protection" afforded him by his domiciliary State.

While the instrumentalities cases are an outgrowth of the constitutional doctrine of Federal-State relationship rather than of the due process clause of the Fourteenth Amendment,

the legal reasoning underlying them is applicable to the instant case. In the instrumentalities cases the Court, in effect, decided that, because of the Federal-State relationship, the States lack jurisdiction to tax Federal instrumentalities. In the cases, as the instant one, under the due process clause, the Court has said that, because of the relationship of one State to another, a State lacks jurisdiction to tax property that has a situs beyond its boundaries. In both types of cases the basic issue is that of State-taxing jurisdiction and the reasoning employed is that which we here invoke.

Land tax-exemption cases also illustrate our contention that, because of the economic intimacy between land and its rents, a tax on the income from land is in effect a tax on the land itself. Where, pursuant to statutory authorization, land is rendered exempt from taxation, the courts have held that the income from the land is similarly exempt. In *Oahu Railway & Land Co.* v. *Pratt*, 14 Hawaii 126, 128, cited with approval by this Court in *Gillespie* v. *Oklahoma*, *supra*, the court stated:

> "It is contended on behalf of the defendant that income is a separate and distinct thing from the property from which it is derived and that although the exemption includes all property 'fairly necessary to the reasonable construction, maintenance and operation' of the road, it does not follow that the income from such property is exempt and cannot be taxed. This contention may be ingenious but it can scarcely be considered sound. It is not material to the determination of the question presented whether or not the income and the property producing the income are one and the same thing. The real question is whether or not a tax on the income is a tax on the property from which the income is derived."

We respectfully submit that upon analysis no logical differentiation exists between a tax on land and a tax on the rents thereof within the meaning of the rule that a State may not tax lands situated beyond its borders.

POINT C.

The decisions of this Court do not preclude a holding that New York is powerless to tax the income of a New York resident derived from rents of New Jersey realty.

An attempted analogy to the powers of the Federal Government to levy income taxes from property owned by American citizens in foreign countries would be fallacious. The jurisdictional limits of Federal as compared to State taxation are so fundamentally different that the argument is impaled upon the horns of its own dilemma. If the analogy had any merit, then the fact that New York cannot levy a property or an inheritance tax upon land or tangible chattels owned by a New York resident in New Jersey would logically lead to the conclusion that the United States could not levy a property or estates tax upon land or tangible chattels owned by an American citizen in a foreign country. This conclusion is patently untrue.

United States v. *Bennett*, 232 U. S. 299.
Frick v. *Pennsylvania*, 268 U. S. 473, 491.

In *United States* v. *Bennett*, 232 U. S. 299, 306, in sustaining a Federal tax upon a vessel belonging to an American citizen and located in foreign waters, this Court took the opportunity of differentiating the restrictive tax operation of the Fourteenth and Fifth Amendments. The Court said:

> "The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is co-extensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense."

This proposition was reiterated in *Cook* v. *Tait*, 265 U. S. 47, 56. After approving the *Bennett* case, this Court said:

> "In other words, the principle was declared that the government [of the United States], by its very nature, benefits the citizen and his property, wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicil of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicil, and the property from which his income is derived may have situs, in a foreign country, and the tax be legal—the government having power to impose the tax."

And in *Burnet* v. *Brooks*, 288 U. S. 378, wherein this Court sustained a Federal estates tax on intangible property owned in the United States by a non-resident alien, the taxpayer, in endeavoring to demonstrate the lack of taxing jurisdiction of the United States, relied heavily on the decisions of this Court with respect to the limitation of the taxing power of the States under the due process clause of the Fourteenth Amendment. This argument, the Court declared, is "specious" and "ignores an established distinction." The Court said, at pages 401, 403:

> "These decisions [*Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *First National Bank* v. *Maine*, 284 U. S. 312] established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State, and that jurisdiction to tax was restricted accordingly. * * * But it has been as decisively maintained that this principle, *thus progressively applied in limiting the jurisdiction of the States to tax*, does not restrict the taxing power of the Federal Government." (Italics ours.)

The decisions of this Court in *Maguire* v. *Trefry*, 253 U. S. 12, and *Lawrence* v. *Mississippi*, 286 U. S. 276, sustaining the right of the domiciliary State to tax the income of residents derived from securities without taxable situs elsewhere or personal activities elsewhere are not determinative of the right of the domiciliary State to tax the income of residents derived from rents from realty in another State.

In *Maguire* v. *Trefry, supra*, it was held that a resident beneficiary of a foreign administered trust of intangibles might be taxed upon the income received from the trust estate. This decision is not a precedent in the instant litigation. Firstly, the *Maguire* case dealt with intangibles; the instant case with the most tangible of tangibles, land. While controversies may be waged concerning the place where the securities have become such an integral part of the economic structure of a State, as to gain a situs there, no such dispute can possibly arise in the case of land.

Senior v. *Braden*, 295 U. S. 422.

Secondly, this Court has characterized *Maguire* v. *Trefry* as not consistent with its present views. In *Senior* v. *Braden*, 295 U. S. 422, 432, the State of Ohio relied on the *Maguire* case, and the Court said of the *Maguire* decision:

> "The opinion accepted and followed the doctrine of Blackstone v. Miller [citation] and Fidelity and Columbia Trust Co. v. Louisville [citation]. Those cases were disapproved by Farmers Loan and Trust Co. v. Minnesota [citation]. They are not in harmony with Safe Deposit & Trust Co. v. Virginia [citation], and *views now accepted here in respect of double taxation.*" (Italics ours.)

A fundamental postulate of the *Maguire* decision was that the principle formulated in *Union Refrigerator Transit Co.* v. *Kentucky, supra*, did not apply to intangibles. This proposition, as we have indicated in Point A, *supra*, pages 8-9, is no longer accepted by this Court.

Safe Deposit & Trust Co. v. *Virginia, supra.*

Similarly, the *Maguire* case rested on the no longer acceptable assumption that the *cestui que trust's* equitable estate has a taxable situs at his domicile.

Safe Deposit & Trust Co. v. *Virginia, supra.*

Lawrence v. *Mississippi, supra,* likewise is not binding precedent. There the domiciliary State, taxing a resident's income, included profits from road-building in another State. The taxpayer there argued that the tax was merely an excise or occupation tax and could not be applied to his activities in another State; this argument the State obviously could refute with little difficulty. In the *Lawrence* case the domiciliary State taxed income from personal activities. Whatever may be claimed for its reasoning or scope, that case is essentially different, by sound legal and practical tests, from the case at bar, where one State is imposing an income tax upon the rents from land located in another State. And we need not explain to this Court the fundamental differences between personal activities and rents.

CONCLUSION.

Throughout legal history the courts have most carefully protected land and its attributes. Whether considered as a subject of taxation or otherwise, land has always enjoyed legal consideration, not found applicable to other classes of property. Land and its enjoyment—whether in the form of crops, fruits, or the rents thereof—have been recognized as integrally related. To separate one from the other, to recognize that one, the land, cannot be taxed and at the same time to hold that that which it produces, the rents, can be taxed, surely introduces an element of conflict between these two integral elements. Such a holding would constitute the use of a product as a means of attack upon the thing itself, where such attack could not constitutionally be made directly.

Beyond question, multiple taxes upon the rents of land impair the value of the land. The New York Court of Ap-

peals, by a closely divided vote, has in the instant case upset what was thought to be a definite situation and has introduced a new constitutional principle which if upheld would subject land to multiple taxation throughout the country. That determination, it is respectfully submitted, should be reversed.

Respectfully submitted,

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